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No. 82-1560

In The

Supreme Court of the United States

October Term, 1982

J. RICHARD DiROSE,

Petitioner,

v.

PK MANAGEMENT CORP.
and FRANK CICCARELLI,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. What evidence may the Court of Appeals properly consider in reviewing a judgment based upon a jury verdict and the denial of a subsequent motion for judgment n.o.v.?

2. To what extent may the Court of Appeals make determinations of the credibility of witnesses and evidence, make findings of ultimate fact, and draw inferences from its view of the evidence contrary to those found by the jury?

LIST OF PARTIES

Petitioner was the plaintiff in the District Court, invoking jurisdiction pursuant to the provisions of Section 27 of the Securities and Exchange Act of 1934, as amended, and federal diversity and pendent jurisdiction (see footnote 1 to Appendix A), and he was the appellee in the Court below. The complaint was dismissed in the District Court against Anthony Curatolo and Jerome Dansker. No judgment was taken in the District Court against Nicholas A. DeMare. The parties in the Court of Appeals were J. Richard DiRose, PK Management Corp. and Frank Ciccarelli.

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OPINIONS BELOW

The following opinions of the Court of Appeals and the District Court are set forth in the Appendices:

The opinion of the District Court denying defendants' motions for judgment n.o.v. or, alternatively, for a new trial, dated September 4, 1981 is set forth in Appendix A.

The opinion of the Court of Appeals for the Second Circuit, 691 F.2d 628, (No. 81-7669, October 25, 1982) is set forth in Appendix B.

The order of the Court of Appeals for the Second Circuit granting Petitioner's motions of November 4, 1982 for enlargement of the time for the filing of a petition for rehearing is set forth in Appendix C.

The order denying the petition for rehearing dated December 22, 1982 is set forth in Appendix D.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 22, 1982. This court has jurisdiction over this petition pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal Constitutional and Statutory provisions involved are Rule 50 of the Federal Rules of Civil Procedure, and the Seventh Amendment to the United States Constitution. They are set forth in Appendix E.

STATEMENT OF THE CASE

This case presents the Court with an opportunity to resolve the conflict among the circuits concerning the proper standard of review of jury verdicts and motions for judgment n.o.v. The conflict centers on the scope of the evidence which the appellate court may consider. The Courts of Appeals for the Second Circuit, the Fifth Circuit and the District of Columbia Circuit hold that they may review all the evidence before the trial court and may overturn the jury verdict on the basis of any contradictory testimony. In the instant case, the Court of Appeals for the Second Circuit ("Second Circuit") reversed a jury finding that the defendants had defrauded the plaintiff. The Courts of Appeals for the First and Third Circuits follow a more restrictive standard, limiting their review to the verdict winner's evidence and the uncontradicted and unimpeached evidence of the party seeking to overturn it.

This Court recently defined the limits on appellate review of judgments in bench trials.[1] In order to promote the consistent administration of justice, it should review the standard applied to appeals involving jury verdicts.

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[1] *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, ___ U.S. ___, 72 L.Ed.2d 606 (1982); *Pullman-Standard, Division of Pullman, Inc. v. Swint*, ___ U.S. ___, 72 L.Ed.2d 66 (1982).

A. ***Proof at Trial***

J. Richard DiRose established a business in the Buffalo, New York area known as "Pizza by DiRose" in 1959, when he opened his first store selling take-out pizza and submarine sandwiches (18-21).[2] The business was a sole proprietorship (24) solely managed by Mr. DiRose. The business prospered and expanded from 1963 until 1975 (23-25). During the calendar year 1974 the business had gross sales of $1,342,412.00 (Defendants' Exhibit 15, 2318). DiRose was operating 18 stores by the summer of 1975, employing in excess of 250 people (29-30).

In 1975, the rapid expansion of his business, coupled with a change in policy by the company from which DiRose leased his ovens and equipment, led to a temporary cash flow problem (33-38). DiRose, who lacked knowledge or experience with regard to such matters (31), decided to examine the possibilities of selling some of his stores to alleviate the cash flow problem or to sell his entire business to a larger company with management expertise in the industry (39).

DiRose was introduced to Frank Ciccarelli by a real estate broker in the Buffalo area in August, 1975 (42). Ciccarelli was Executive Vice President of PK Management Corp. ("PK"), which owned and operated a chain of "Pizza Kitchen" Italian restaurants in the Rochester area and one in the Buffalo area. He was a PK director, a member of the executive committee of the Board of Directors, and PK's principal financial officer. (See, e.g. 51, 1385-1394). Over a period of months Ciccarelli spent countless hours at the offices of Pizza by DiRose in Clarence, New York, ingratiating himself with the DiRoses and making himself intimately familiar with the operation of the business and with all of its books and records (46-53, 493, 740-755). Ciccarelli was in the DiRose offices at least three or four times a week from September through December, 1975 and

[2]Unless otherwise indicated, parenthetical numerical references are to the appendix on appeal.

when not there took to telephoning the office manager, Lyn Stainsby, directly to obtain daily information about the company's finances and operations (753). At his request, a telephone answering machine was installed so that Ciccarelli could telephone in after office hours to obtain daily reports concerning the operating results of the DiRose stores (746-747).

Ciccarelli impressed DiRose with tales of major accomplishments as a financier and securities salesman (51); he became the younger man's mentor and advisor (63). Ciccarelli held himself out to be an experienced and sophisticated businessman, with expertise in finance (1501). DiRose came to rely on his expertise and his promises.

As the months following August 1975 went by, DiRose's cash situation steadily deteriorated (64) while Ciccarelli, aware of all of the details of the company's position and of offers from others to purchase some of the DiRose stores, continued to hold PK out to DiRose as the answer to his temporary problems and to his future (70-73, 94-99, Plaintiff's Exhibits 2, 2A and 6, 2355, 2356 and 2366; 1552-57).

The initial proposal discussed by Cicarrelli with DiRose was a sale by DiRose of the entire Pizza by DiRose operation to PK and personal participation by him in the thus expanded PK operation in management of the Buffalo locations (44-46, Plaintiff's Exhibit 35, 2383-2384). During subsequent conversations, Ciccarelli gradually converted the proposal into an arrangement by which PK would initially sublease the 8 premier locations of the 18 leased locations operated by DiRose, with a view to subleasing additional locations (112-113).

Acutely aware of DiRose's increasing cash flow problems, Ciccarelli made unequivocal commitments to DiRose on behalf of PK at various times, including a dinner meeting at Ciccarelli's home which was attended by both Mr. & Mrs. DiRose on January 10, 1976 (114-120, 499-508). At that meeting, Ciccarelli explained that PK had prefabricated and preordered equipment packages for use in the Pizza by DiRose units, because the DiRose "leases were golden", that is, that the

DiRose leased locations had great and proven value (501). PK would spend at least $80,000 to $100,000 dollars per unit for redecorations and improvements to the Pizza by DiRose locations, starting with the Niagara Falls Boulevard location. The funds for this undertaking would be generated by the then-pending public offering of PK securities. DiRose would become a stockholder and Vice President of PK, and would be General Manager of the Buffalo area operations with an annual salary of $25,000. PK would retain the DiRose office staff and key supervisors and would undertake a variety of other payments (116). Ciccarelli's own notes made at the meeting confirmed the testimony of the DiRoses as to these promises, representations and inducements (Plaintiff's Exhibit 7, 2367). Ciccarelli had investigated their business and financial affairs in detail, he told them, because of the extensive capital PK would be expending in converting the DiRose locations to Pizza Kitchen restaurants (1558).

The evidence is conclusive that in order to entice and induce Mr. DiRose to turn over his business to PK, Ciccarelli repeated these representations, not only to the DiRoses but to others as well. As Lyn Stainsby testified, Ciccarelli made these representations of fact in late 1975 and early 1976 without equivocation: "There were no if's, and's or but's about it. Each unit was going to be remodeled one by one. They [PK] were deciding what order, but all were going to be remodeled" (752). Ciccarelli told her and the DiRoses that each of the DiRose locations would be redone as part of the PK-DiRose transaction, including a stucco and wood decor, with booths, tables, salad bars, new equipment and added carpeting (749-752, 755-770). It was never done.

On January 23, 1976, Ciccarelli and DiRose met with Allen Baun, then an Assistant Vice-President and Commercial Loan Officer with Manufacturers Hanover Trust Company, the bank with which DiRose was doing business and to which he had substantial indebtedness. Ciccarelli told Baun that PK would invest the necessary funds to renovate, redesign and substantially improve the appearance of the Pizza by DiRose

locations to conform with PK's "Pizza Kitchen" Italian restaurants, and that, in the event that PK determined it was unable to operate the Pizza by DiRose locations profitably, the improved locations would revert to Mr. DiRose and he would be under no obligation to pay for the renovations and improvements that had been made by PK (477-484). In short, Mr. DiRose had nothing to lose and everything to gain by turning over his business to PK.

During the period August 1975 through March 1976, Ciccarelli built a close personal and social relationship with the DiRoses. Having advised them that the proceeds for the $800,000 cost of renovation of the DiRose stores would come from the sale of PK securities (121-123), Ciccarelli used the DiRoses and their contacts in the Buffalo area in selling these PK securities (see e.g., 124-130). He showed DiRose a supplement which PK had issued to its prospectus in February and March 1976 communicating the agreement with DiRose to prospective PK bond purchasers which stated that the estimated cost of $100,000 to convert each of the 11 Pizza by DiRose locations was less than what it would cost PK to develop its own units (140-142, Plaintiff's Exhibit 5, 2365). As of February 4, 1976, more than $1,000,000 of the $3,000,000 offering of October 1, 1975 remained unsold (1514). Following the execution of agreements with PK in March 1976, DiRose's remaining locations which were not subleased by PK were either taken over by someone else or absorbed by Buffalo George Urban Corporation, a subsidiary of PK (169). Ciccarelli continued to discuss the remodeling of the units with DiRose (143).

The negotiations during 1975 and early 1976 took place without DiRose having the benefit of any counsel. Ciccarelli told DiRose during their discussions that there was no need to bring attorneys into the picture, and that Ciccarelli would advise DiRose if he needed counsel (451). Meanwhile, the PK attorneys were preparing agreements. When it came time to sign the documents dated February 4, 1976 and March 18, 1976

which had been drafted by the Woods, Oviatt law firm on behalf of PK, Ciccarelli instructed DiRose to bring his friend, Albert Pinsky, a Rochester attorney, to the closing (449, 451-452). His sole role as fashioned by Ciccarelli and PK was cosmetic: to appear at the closing. Pinsky had no participation in the negotiation, preparation or drafting of any of the various documents (451-452) nor did he receive any fee from DiRose (452). Pursuant to Ciccarelli's instructions DiRose simply had Pinsky appear for the signing of fully completed and final documents to give, as the jury found, the appearance of representation.

Following the signing of the various documents DiRose worked in Buffalo as an employee of Buffalo George Urban Corporation, a subsidiary of PK, which handled the day-to-day operations of the stores. He was never made a Vice President as promised and represented. He was not given the promised managerial position, serving instead as an administrative functionary under the complete control and direction of Ciccarelli and PK president Nicholas Demare, who made all management and policy decisions with regard to advertising, marketing, and all aspects of the operations of the stores (440-443). Ciccarelli continued to assure DiRose that the restaurants would be remodeled and renovated (143) while simultaneously confirming the fraudulent nature of those promises and representations to the PK board of directors (see, e.g., Plaintiff's Exhibit 19A, 2371).

In October 1976, after PK had done nothing to remodel or renovate the restaurants as promised, and after PK had run the restaurants into the ground, Ciccarelli gave DiRose a sudden ultimatum that DiRose either participate in the purchase of the stock of Buffalo George Urban Corporation to which the DiRose leases had been assigned by PK, or else he would be "left out in the cold" (172-187). Ciccarelli promised DiRose that Ciccarelli's son-in-law, Anthony Curatolo, a securities representative, would join Buffalo George Urban Corporation and would raise approximately $200,000 in capital necessary to

the survival and operation of the company. Ciccarelli further represented that Buffalo George Urban Corporation would become the exclusive licensee for granting "Pizza Kitchen" franchises throughout the Western New York area. DiRose was given 24 hours to make his decision. He was thus faced with an ultimatum, sweetened by more promises from an artful and experienced "financial wizard", which provided him with no real alternative.[3] He could refuse to follow Ciccarelli's directions and lose any chance of salvaging a business he had built up over thirteen years as well as employment which had become critical to his personal survival, or he could accept the ultimatum and do as Ciccarelli and PK importuned him to do. Ciccarelli engineered another sleight of hand manipulation of counsel, retaining, ostensibly to represent DiRose, a Buffalo-area attorney named Nicolas Konst who was a longtime friend of Ciccarelli's and who had represented Ciccarelli in numerous business transactions (193, 1455-1472) to prepare the papers regarding the transfer of Buffalo George Urban stock, including the release relied upon by the defendants (460-461). In order to obtain some signatures from DiRose, Konst had DiRose sign the papers in Konst's automobile in the parking lot of a Buffalo restaurant. DiRose was not given any copies of the documents (461). Konst did not appear at the trial to explain his role in the continuing fraud being practiced on DiRose.

Curatolo did not raise the promised capital and in fact signed over $24,000 out of the $83,000 he did raise to PK and himself

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[3]In fact, as the jury learned, this "wizard" had been found guilty by the National Association of Securities Dealers of violating various rules of the NASD and the SEC regarding, among other things, keeping books and records and the handling of customer accounts while he was Chairman of Cushing Capital, Inc., a securities firm (Defendants' Exhibit 47, at 2353; Plaintiff's Exhibit 5, original prospectus at page 19). The type of conduct engaged in by defendants with respect to Mr. DiRose continued into the trial itself (see for example the record of the extraordinary activities of defendants and their counsel at 1368-1372, which is annexed hereto as Appendix F).

at the signing of the Konst papers in December, 1976 (188-191). The remainder of the money was used by DiRose in an unsuccessful attempt to satisfy creditors of Buffalo George Urban Corporation. Curatolo, who had not worked as promised to restore the Buffalo George Urban Corporation to a stable financial position but had continued his stock brokerage activities then abruptly announced that he was "returning" to his former stock brokerage, and did so. Without cash or the ability to obtain credit, and unable to meet pre-existing major obligations to suppliers incurred during the PK operation, DiRose was unable to remain in business and was forced simply to surrender his locations or allow them to be taken over by people who agreed to assume payments on his leases (198-201). He was left with nothing (201).

As the jury found, after ten days of testimony and opportunity to assess the credibility and reliability of the parties and their witnesses, PK and Ciccarelli perpetrated a monstrous fraud on a trusting and unsophisticated young man which resulted in the destruction of his entire business. With consummate artifice, with all the "legal" trimmings, PK and Ciccarelli got the plaintiff to turn over his entire business to them "for nothing" as their lawyer conceded, and, after they had totally destroyed that business, got him to take back nothing except obligations.

The case was ultimately considered and unanimously decided by a seven person jury, six regular jurors and one alternate (1900-1904, 2153). The jury verdict awarded DiRose $362,000 actual and $500,000 punitive damages against PK Management Corp. and Frank Ciccarelli on his first cause of action, and $30,282.33 against PK only on his second cause of action.

B. ***The Decision of the Second Circuit.***

The Second Circuit reversed and remanded the case to the United States District Court for the Western District of New

York, *Rochester Division.*[4] It selected for discussion some, but not all of the evidence and concluded that the verdict was in part "predicated on facts that were not in evidence". These facts were never identified by the Court. The decision is manifestly in error in holding that the jury verdict was not amply supported by evidence considered by the jury, as follows:

(1) *Proof of Damages:*

(a) The decision rejected plaintiff's proof of damages on the basis that it did not satisfy the Second Circuit's view of proof required *to determine the value of dissenting shareholders' stock in a proceeding under Section 623 of the New York Business Corporation Law (BCL 623).* That specifically designed and limited statutory provision is not controlling or applicable with respect to the proof of the value of plaintiff's business before its destruction by defendants' fraud. In this respect, the decision overlooks and misconstrues *unrebutted* testimony, misconstrues the scope and applicability of *Matter of Endicott Johnson Corp. vs. Bade,* 37 N.Y.2d 585 (1975), and would publish a determination in direct conflict with governing New York law and with the Second Circuit's own decision in *Seaboard World Airlines vs. Tiger International, Inc.,* 600 F.2d 355 (2d Cir. 1979).

(b) By its own statement the Second Circuit improperly premised its reversal of the jury's verdict for compensatory

[4]The venue of the trial was, without objection by PK, in the Buffalo Division where the plaintiff's business has been located and the transactions at issue occurred. PK at no time, either at trial or on appeal made any request that the case be tried in or remanded to the Rochester Division. Nevertheless, Judge Van Graafeiland ordered the case remanded to *Rochester* stating that since PK was then involved in bankruptcy proceedings there, such remand was appropriate. The fact of PK's post-trial and post-appeal bankruptcy was not part of the record of the case and to petitioner's knowledge not communicated to the Court in any formal fashion. This unilateral action of the Court on the basis of undisclosed non-record information would impose substantial financial burdens on petitioner and perhaps foreclose any retrial if the Second Circuit decision is upheld.

damages on sheer and wholly unsupported and insupportable speculation that the verdict was "predicated on facts that were not in evidence" and upon "a misguided understanding of the applicable law" (Decision, 5459).

(c) The decision ignores unrebutted proof of the value of plaintiff's business and improperly characterizes and rejects the *unrebutted* testimony of plaintiff's expert witness, Leonard A. Dopkins.

(d) The decision creates a non-issue in an effort to support its pre-determined conclusion rejecting plaintiff's damage proof, that is, that the jury did not reduce or diminish its compensatory damage award by the "value" of what the plaintiff received as a result of the fraud. The Second Circuit's criticisms and holdings in this respect are completely and undeniably incorrect in view of the defendants' own emphatic position that plaintiff received "nothing of value" from the fraudulent agreements.

* * *

(a) *Erroneous Application of Law.* The Second Circuit's reliance on *Matter of Endicott Johnson Corp. vs. Bade, supra,* is misplaced. The *Endicott Johnson* case involved a special proceeding *brought pursuant to Section 623 of New York's Business Corporation Law* which is *explicitly* limited to procedures with respect to the determination of the value of the shares of stock of minority stockholders dissenting to proposed corporate action. The New York Court of Appeals observed that there were important policy considerations that related to the statutory appraisal proceeding for the protection of dissenting minority shareholders (37 N.Y.2d at 589-90). Obviously, these policy considerations which resulted in the enactment of §623 have absolutely no application to the case at bar, and there is no justification for the Second Circuit to apply its perception of New York law under BCL 623 to an entirely different situation not within the purview of that specifically limited statutory provision.

Indeed, in a situation such as this not involving a proceeding under BCL 623, the Second Circuit has itself previously spoken in strong and approving terms of the dominating preference for the use of market value of stock in valuing a corporation which is publicly traded. The issue arose in a case involving alleged Securities Act violations in *Seaboard World Airlines, Inc. vs. Tiger International, Inc., supra,* where the Second Circuit stated:

> The Seventh Circuit recently observed that "when market value (of stock) is available and reliable, other factors should not be utilized in determining whether the terms of a merger [are] fair". [Citations omitted]. Underlying such an approach is the "efficient market theory", which, briefly stated, is that in a free and actively traded market, absent compelling reasons to believe otherwise, the market price is held to take account of asset value as well as the other economic, political and financial factors that determine "value". [Citations omitted]. State shareholder appraisal suits, which present situations closely analogous to that at bar, have long endorsed this theory. In *In re Deutschmann,* 281 A.D. 14, 22, 116 N.Y.S.2d 578, 584 [1st Dept. 1952] . . . the Court held that because the market price at which the stock was traded . . . was a fair reflection of the buying and selling public's estimation of the stock's value, reasonable men could not dispute the fairness of the offered price. (600 F.2d at 361-2).

In that case, the Second Circuit also suggested very specifically that where a reliable market for the shares exist, the market price is the best way to establish the "going concern" value of a corporation. (Id. at 362). See also *In re Marcus,* 273 A.D. 725 (1st Dept. 1948) cited approvingly by the Second Circuit in *Seaboard,* an appraisal proceeding in which the Appellate Division held that the appraisers might consider the use of comparable securities, and specifically test the market value of stock in the corporation operating Macy's Department Store by the market values of other companies in the department store field.

Accordingly, the traded stock market value of the PK stock as used by Mr. Dopkins was an entirely appropriate method, under the Second Circuit's own earlier decisions, to obtain a value of the PK corporation for comparison purposes. The decision's proposed holding to the contrary involves an improper application of an inapplicable statutory special proceeding designed for and limited to an entirely inapposite valuation issue and the publication of a determination which is in direct conflict with established New York law and the Second Circuit's own decision in *Seaboard World Airways*.

(b) *The Second Circuit involved itself in Sheer and Insupportable Speculation Concerning the Basis for the Jury's Damage Verdict.*

Defendants made no request for special questions to be submitted to the jury which, therefore, rendered a general verdict of liability, awarding compensatory and punitive damages. The Second Circuit cannot claim the prescience required for it to make pronouncements or findings as to what the jury did or did not consider. Despite these facts, the Court initiated its discussion of the verdict on damages with the following extraordinary statement: "Because it is clear beyond peradventure that the jury's verdict on damages was predicated on facts that were not in evidence and upon a misguided understanding of the applicable law, we will discuss that issue first". (Decision, 5459)

That there is no conceivable basis for such an extraordinary premise for its decision is confirmed by the Court's failure through inability to identify *any* of the alleged "facts that were not in evidence" upon which the Court speculated that the jury, "beyond peradventure" predicated its decision. Any citizen or attorney relying on the constitutional right to a fair jury trial of factual issues, and indeed any Court apparently save Judge Van Graafeiland's Court, must be mystified and offended by that Court's claim of a prescience so remarkable that it can conjure and publish the conclusion that the jury predicated its verdict

on unidentified and non-existent "facts that were not in evidence". This statement — this approach — by the Second Circuit with respect to review of jury determinations epitomizes the vice which this petition seeks to reform. The Second Circuit, by decisions of this nature, is abrogating the critical fact-finding function of the jury and is assuming the right to totally disregard jury verdicts and factual determinations by itself attempting to decide controlling issues of credibility and, when the fancy strikes, by the simple expedient of engaging in the most aggravated and injudicious speculation of what the jury did or did not consider in arriving at its factual determinations. Simply put, the stated premise of the Second Circuit's decision, that the jury verdict "was predicated on facts that were not in evidence" is so patently outrageous as to offend any rational view of the function of an appellate court reviewing a jury determination.

(c) *The Decision Erroneously Ignores and Rejects Proper Proof of Damages.*

From the inception of the case, it has been plaintiff's position that his business was totally ruined and destroyed as a result of the defendants' continuous fraudulent conduct (see Amended Complaint, 13A-24A). In addition to his own testimony, plaintiff offered proof of damages through Leonard Dopkins, a Certified Public Accountant with extensive experience in work for ongoing restaurant chains (846-851).

Mr. Dopkins performed an analysis with respect to the value in February, 1976, of the Pizza by DiRose business as a going concern (856). He testified that the most commonly used method for valuing businesses is the use of comparables (853), and that this method of evaluating ongoing businesses is generally accepted in accounting practice. The methodology entails a search for other businesses engaged in similar lines of activity whose value is then compared, with appropriate adjustment, to the value of the subject business (853-854). The witness considered the use of alternative methods of valuing the business, and in the absence of current profits or income to

capitalize, elected to use gross sales as the best yardstick for valuation in a situation dealing with a service intensive company (980-981). The "appraisal" of assets method was considered and rejected as inappropriate when valuing a non-capital intensive business as to which gross sales provide the accepted basis for valuation (854-855, 980). Since PK Management was in the same type of business, also showing year end losses, with gross sales of $1,434,000 compared with $1,262,000 for DiRose, and since financial and other relevant information on PK was readily available, that business was properly selected as a "comparable".

The key factual point, wholly ignored by the decision, is Dopkins' unrebutted testimony that he considered the use of other methods of valuing an ongoing business and, using his experience and expert judgment, selected from among them the use of a suitable comparable, given the facts and circumstances of this particular case. He did not "simplistically" value Pizza by DiRose by mechanically multiplying the number of shares of PK traded on the open market times their value. Instead, he selected the value of PK as expressed on the market as the most suitable starting point for his valuation of Pizza by DiRose.

In his examination of the trading of PK's stock this expert noted that more than 3,000,000 shares were outstanding representing all of the ownership of the company, and that a substantial range in the traded market price of the stock existed over a three year period (968-972). He conservatively used the *lowest* market value for fiscal 1974 since that was the year when PK had a loss comparable to that experienced by Pizza by DiRose (973). The resulting total market value of PK's outstanding stock was then discounted ten percent because Pizza by DiRose was not a corporation publicly traded. That discounted value was reduced an additional two-thirds in order to reflect "Mr. DiRose's different conditions" (963). These highly conservative adjustments were explained in *unrebutted* detail as being appropriate on the basis of Mr. Dopkins' professional judgment and experience and in view of the

particular circumstances of plaintiff's business (994-5; 992-1003).

In formulating his expert opinion, Mr. Dopkins also consulted data produced by the U.S. Department of Commerce as well as published information on fast food retailing businesses and operations (857, 861, 869, 989-990). In short, this expert testimony provided a reasonable and accepted basis for the valuation of the DiRose business. *Significantly, the defendants offered no proof whatsoever in rebuttal of the Dopkins testimony.*

Contrary to Judge Van Graafeiland's incorrect characterization of the Dopkins analysis and testimony — a characterization made in the improper effort to apply BCL 623 to this case — Mr. Dopkins did not perform an "appraisal" of the value of the PK assets. As established by the *unrebutted* testimony no such "appraisal" was appropriate under the circumstances and, on the contrary, the method employed by Mr. Dopkins is established in the record — *and by applicable law* — as the most appropriate valuation method available. There is absolutely no basis for the substitution by the Second Circuit of a judgment on this subject in direct conflict with the unrebutted proof and applicable New York State law.

(d) *The Non-Issue of "Benefits Received by DiRose" Not Being Applied to Reduce the Jury Award.*

The extent to which the decision "reaches" in an effort to support its result is further illustrated by the assertion that the charge to the jury erroneously precluded its taking into account all the "rights or benefits" received by DiRose in calculating the damages awarded. It is significant that this is a new matter, never raised by the defendants at trial or on their appeal. Despite the fact that no request was made by defendants, the Trial Court in fact charged the jury several times that any damages found would be reduced by "the value of what [DiRose] received in return" or "the value of any property or rights received in return" (2075-2076).

The *record fact,* which cannot be avoided but which the Second Circuit curiously chose to ignore is that *the defendants themselves insisted and argued to the jury that DiRose had received nothing of value from the Agreements* (summation of defendants' counsel, trial transcript, original record volume X, page 28). Of course, if Mr. DiRose received nothing of value — no rights or benefits — from the defendants' conduct, *as the defendants themselves explicitly conceded,* there is nothing for the jury (or the Court) to deduct from the damages found to have been the result of defendants' fraudulent conduct. It is, again, inconceivable that the assertion should be made in Judge Van Graafeiland's decision that the charge to the jury was in any respect in error or confusing as to this matter of diminution of damages. When the defendants themselves admit that the plaintiff received no value, that subject becomes a non-issue and there is no conceivable way in which the jury could have become confused or could have acted improperly in accepting the defendants' concession that no value was received by Mr. DiRose which should or could be deducted as a diminishment of the damages found.

The record also clearly establishes that the stores had no value as of December 13, 1976. Without cash or the ability to obtain credit, and unable to meet pre-existing major obligations to suppliers incurred during the PK operation, DiRose was unable to remain in business following December, 1976 and was forced simply to surrender his locations or allow them to be taken over by people who agreed to assume payments on his leases (198-201). He was left with nothing (201).

(2) *The Decision Overruling the Jury Determination of Fraud Throughout the Entire Transaction Misapprehended the Testimony, Misapprehended Applicable Law, Pre-empted the Jury's Determinations of Credibility, and Imposed an Improper Burden of Proof on the Plaintiff.*

The trial court repeatedly and appropriately charged the jury on the requisite elements of fraud in New York, including intent. (See e.g. 2063, 2066, 2069-72). The Second Circuit focused on Ciccarelli's "state of mind" in his dealings with plaintiff as being the key to the entire case. The jury had, as the Second Circuit did not, full opportunity to evaluate Ciccarelli through his testimony and his demeanor, and had more than sufficient cause to reject completely — as was its exclusive prerogative — all of his testimony and to conclude that the man was a master con-man who had bamboozled plaintiff from start to finish and who had attempted as well to bamboozle the jury itself. The jury had every right to conclude that the eventual "review" of some preliminary plans with respect to the promised reconstruction by the PK Board was simply a part of the ongoing fraud and not, as the decision speculates — again in preemption of the jury's function — exculpatory conduct.

The trial court charged that "the intention of a person to carry out a promise must be determined in light of all of the circumstances in which it was made. Also, events occurring after the promise was made may provide evidence to you of the intent with which the promise was made. But the crucial time is the time as of which the promise was made". This was certainly no license to conclude that mere non-performance by the defendants was enough to sustain plaintiff's burden. On the contrary, the charge on common law fraud closely followed the pattern in both New York state and federal practice, and made it clear to each juror that a finding of actionable fraud would have to depend on more than a mere showing of non-performance by the defendants in failing to refurbish the restaurants as promised.

The trial court's inclusion of the "recklessness" standard in its charge was entirely appropriate in this case and fully supported by the record. The jury had the right to conclude that Ciccarelli defrauded DiRose in promising that PK would

redecorate the restaurants when he knew they never would, *or* in promising that PK had decided to redecorate when he had no idea whether or not PK would ever decide to do so.

The Second Circuit stated that "Mr. Ciccarelli's intent or state of mind when he made the alleged promises obviously was a matter concerning which he had knowledge" (at page 5463). It is equally obvious that this would be the case for every person who intentionally makes a statement of fact knowing that it is false or knowing that he lacks knowledge whether or not it is true. If a statement is recklessly made without knowledge or without genuine belief in its truth the statement is actionable as fraud. *Hadcock vs. Osmer,* 153 N.Y. 604 (1897); *Terris vs. Cummiskey,* 11 A.D.2d 259 (3d Dept. 1960). The sense of *scienter* includes a "reckless indifference to error", a "pretense of exact knowledge" and the "assertion of a false material fact" susceptible of accurate knowledge but stated to be true on the personal knowledge of the representer. *Skrine vs. Staiman,* 30A.D.2d 707 (2d Dept. 1968).

In this case, as in many other recent decisions, the Second Circuit has improperly assumed unto itself the right to make factual determinations concerning the credibility of testimony given to and rejected by a jury. The essential import of Judge Van Graafeiland's decision in this case is that the Second Circuit at least has the right to deprive a litigant of his Seventh Amendment right to a trial by jury on the precept that it is that Court and *not* the jury which decides on the credibility of witnesses and decides the factual issues prosecuted. That decision and that approach must not be allowed to stand if the Seventh Amendment is to have any meaning.

(3) *As to the Validity of the Release, the Second Circuit Again Improperly Speculated as to the Basis for the Jury's Finding that the Release Was Illegally Obtained and Again Substituted its Judgment for that of the Jury On Issues of Fact and Credibility.*

Among other things, the Second Circuit proceeded on the inaccurate assumption that the only basis upon which the jury could find the release to be not binding on plaintiff would be a determination that plaintiff signed the release as a result of coercion or duress. On the contrary however, there is proof in the record that plaintiff not only felt that he was coerced into signing the release by the circumstances created by defendants, but also that his action in that respect was the result of defendants' continued fraud in making false promises of assistance, and his continued subjugation by Ciccarelli (172-178, 181-191, 198-9). The jury had the exclusive right to make such determinations based on its assessment of all of the facts and the credibility of the witnesses. There is no way that the Second Circuit could speculate or surmise concerning what proof in the record the jury relied upon in determining that the release was fraudulently obtained.

Illustrative not only of the basis in the record for a jury determination of fraudulent conduct by defendants in obtaining the release, but also of the impropriety of the Second Circuit's making factual determinations not made by the jury and not supported by the record, is the Court's reliance, as a basis for its decision on the release, on its erroneous assertion of "fact" that when the plaintiff signed the release he was "represented by an attorney" (Decision, 5466). The testimony and the evidence were conclusive that Ciccarelli retained attorney Konst to prepare the documents relating to the George Urban transaction, including the release, that Konst and Ciccarelli had a long-standing personal and professional relationship, that DiRose never employed Konst, that DiRose never paid Konst for any services, and that Konst had not given DiRose any advice whatsoever with respect to the execution of documents in October and December, 1976 (460-61, 1455-72). The proof — which the Second Circuit ignored — establishes that Konst was the agent of defendants. The Court's finding — essential to its decision on the release — that Konst was plaintiff's attorney was *rejected* by the jury, which, of course,

had the right to make such factual determinations.

The decision concludes ". . . that the jury's finding of duress was against the great weight of the evidence. ." (5465). There is, of course, no way of knowing whether the jury based its decision to disregard the release on the basis of duress or on the basis of the testified continuing fraudulent representations and imposition of Ciccarelli and PK. Moreover, the Court does not identify the evidence which purportedly establishes that a finding of duress would be against "the great weight of the evidence". The absence of such an explication is further confirmation of the absence of any evidence in support of the Court's factual surmise.

The Second Circuit ends its discussion of the release with the following statement: "Unless appellee comes forward with a compelling reason for his lengthy delay in repudiating the release, the district court is directed to dismiss appellee's claims on the law." No authority is of course provided for the attempted application of a burden of proof that the appellee-plaintiff must come forth with "a compelling reason" for the alleged delay in repudiating the release, for the simple reason that there is no such authority. Again, the Second Circuit sought to impose on this plaintiff a burden of proof beyond the properly applicable fair preponderance of the evidence standard.

The Second Circuit also failed to take note that the continuing fraudulent conduct of the defendants was claimed to vitiate the December, 1976 release as well as the previously signed agreements (2093). This claim would void the release and preclude a dismissal based upon the release even if the defense of duress had been somehow waived by Mr. DiRose.

(4) *Plaintiff has a Constitutional Right to a Trial by Jury and not to Have the Jury's Function and Prerogatives Subverted by the Second Circuit.*

The constitutionally guaranteed right to trial by jury is subverted if the Second Circuit arrogates, as has been done here, the right to make determinations of fact based upon determinations of credibility or upon the selective ignoring of testimony and evidence in the record. Careful review of the decision in question confirms that the Second Circuit improperly substituted its judgment from afar as to the credibility of witnesses and the facts of this matter for that of the jury which saw and heard 18 days of testimony. A review of the testimony of Ciccarelli and of the PK president, Nicolas DeMare, will demonstrate the obvious lack of credibility of those witnesses and of defendants.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Certiorari should be granted to review the standard imposed by the Second Circuit in a recent line of cases, in conflict with the First and Third Circuits, and the established prerogative of the jury under the Seventh Amendment, which permits the Appellate Court to make a de novo determination of factual issues.

Petitioner urges this Court to review the decision of the Second Circuit, not only to insure that that court applies the proper standard of review in appeals involving jury verdicts, but also to resolve the conflict among the circuits as to the scope of evidence subject to appellate review. In such appeals, the Second Circuit reviews all the evidence to determine whether there is substantial evidence to support the jury's findings, a practice that "comes dangerously close to weighing the evidence" 9 C. Wright and A. Miller Federal Practice and Procedure §2529 at 571 (West 1971). In effect, that standard permits the court to draw inferences which it deems proper, substituting its judgment for that of the jury.

The Second Circuit has accepted as reliable and credible the testimony of interested witnesses on behalf of the parties seeking to overturn the verdict despite the jury's clear rejection

of that same testimony. It has drawn inferences based on such interested testimony and has speculated on facts not in evidence, despite the fact that, unlike the jury or the District Judge who reviewed that verdict in the first instance, it could not observe the demeanor or assess the credibility of the witnesses.

This Court should review that practice for three reasons. First, the standard applied by the Second Circuit is a radical departure from established appellate practice, and ignores the directions of this Court concerning the deference due to determinations by triers of fact. Second, the Second Circuit's standard is in direct conflict with the clearly more appropriate scope of review of the facts undertaken by the First and Third Circuits. Third, that court's practice essentially denies the parties the right to trial by jury.

Each of these considerations goes to the core of the fact-finding function of the federal judicial system and affects all litigants. Review is warranted because the Second Circuit has departed from the accepted and usual practice in judicial proceedings, and its course will be righted only by the exercise of this Court's supervisory powers. In order to insure compliance with the Seventh Amendment and that justice is administered fairly and consistently, this Court should review the decision below.

The facile reversal of the jury verdict following the lengthy trial in this case does not stand alone in the Second Circuit.[5]

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[5] *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036 (2d Cir. 1976) (The court reversed a jury verdict in the plaintiff's favor, following a four-week trial of the antitrust action, on the ground that there was insufficient evidence of concerted action); *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir. 1978), cert. denied 439 U.S. 946 (1978) (The majority of the court sitting en banc credited the testimony of the defendant's officers in holding that the plaintiff's termination did not result from an unlawful conspiracy. The Court affirmed a directed verdict for the defendant after retrial on the ground that the plaintiff had failed to prove a conspiracy. *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75 (2d Cir. 1980), cert. denied,

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In the case at bar, the Second Circuit simply accepted as true the defendants' testimony and ignored compelling testimony on behalf of Petitioner. It reached conclusions relating, among others, to Ciccarelli's intent to deceive DiRose, DiRose's access to counsel, fraud and duress in securing the release from DiRose — factual issues all — contrary to the proof in the record on DiRose's behalf. In some instances the Court adopted inferences unfavorable to DiRose, substituting its judgment for that of the jury on disputed facts. In other instances the Court dismissed facts in the record from its consideration and engaged in sheer speculation to manufacture a basis for decision on a particular issue.

The conflicting results reached by the Second Circuit and the District Judge result from the different standards applied by each in reviewing the verdict. The Second Circuit usurped the jury's function, made decisions on credibility without which its factual conclusions could not be reached, totally rejected the jury's determination of controlling factual issues, and engaged in impossible speculation concerning what the jury did or did not consider in arriving at its verdict. The District Judge was eminently more circumspect, guided by the principle that the non-moving party must be given the benefit of all reasonable

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102 S.Ct. 639 (1981); *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), cert. denied, ___ U.S. ___, 51 U.S.L.W. 3258 (October 4, 1982) (The court, relying in part upon disputed and inconsistent testimony of the defendant's witnesses, reversed the denial of the defendant's motion for judgment n.o.v.); *Schwimmer v. Sony Corp. of America*, 677 F.2d 946, (2d Cir. 1982), cert. denied, ___ U.S. ___, 51 U.S.L.W. 3362 (November 8, 1982) (The court again reviewed all the evidence and accepted the defendant's explanation of the plaintiff's termination in holding the proof of conspiracy was insufficient. It even determined an issue of credibility, refusing to credit the testimony, favorable to plaintiff's position, of one of the defendant's executives, because it was not corroborated by other defense witnesses); *Unijax, Inc. v. Champion International, Inc.*, 683 F.2d 678, (2d Cir. 1982) (The court, in affirming judgment for the defendant n.o.v. reviewed the evidence which it deemed relevant, and concluded that the plaintiff had failed to prove a tying arrangement in violation of §1 of the Sherman Act.)

inferences from the evidence, and that evidence unfavorable to it may be considered only if that evidence stands uncontradicted and unimpeached. (See e.g., *Bigelow vs. Agway, Inc.*, 506 F.2d 551, 554 (2d Cir. 1974)). His decision recognizes the deference to be given the trier of fact. The Second Circuit's standard, in effect, makes *it* the fact finder. That standard should be reviewed and disavowed.

A. *The Second Circuit's Review of Jury Verdicts Conflicts With The Principles Established By This Court Affirming The Role of Juries and District Courts in Determining Questions of Fact.*

In the past year, this Court has reaffirmed the deference due factual findings by the District Court in bench trials. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, ____ U.S. ____, 72 L.Ed.2d 606 (1982) *("Inwood")* and *Pullman-Standard, a Division of Pullman, Inc. v. Swint*, ____ U.S. ____, 72 L.Ed.2d 66 (1982) *("Pullman")*, both enunciate the principle that those issues are best resolved at the trial level and such determinations should not be overturned lightly on appeal. In *Inwood*, this Court noted "the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence. (Citation omitted)." Id. at , 72 L.Ed.2d at 616.

This Court criticized the Second Circuit's reversal:

> By rejecting the District Court's finding simply because it would have given more weight to the evidence of mislabelling than did the trial court, the Court of Appeals clearly erred. *Determining the weight and credibility of the evidence is a special province of the trier of fact.* (Id. at , 72 L.Ed at 616-17, emphasis supplied)[6]

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[6]The District Judge in the instant case appropriately proceeded on the basis that juries are best qualified to determine issues of credibility. This comports with the principle later enunciated in *Inwood* and *Pullman*, but rejected by the Second Circuit.

Elaborating on that basic and essential principle, this Court further instructed the Second Circuit that:

> An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court "might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent." *United States v. Real Estate Boards,* 389 U.S. 485, 495 (1950). Id. at , 72 L.Ed.2d at 618.

The inferences drawn by the District Court were not unreasonable, and the Second Circuit cited no evidence to support its conclusion that they were. Id. at , n. 16, 17, 72 L.Ed.2d at 616-17, n. 16, 17. It is apparent that the Second Circuit has chosen to ignore this Court's decisions and instructions in its determination to set itself up as the trier of fact.

Pullman reversed the Fifth Circuit's conclusion which "strongly suggest[ed] that the outcome was a product of the court's independent consideration of the totality of the circumstances it found in the record." Id. , 72 L.Ed.2d at 81. This Court rejected such a de novo review of the evidence.

Just as the Second Circuit substituted its judgment for that of the trial court in *Inwood,* so it substituted its judgment for that of the jury and indeed for that of the District Judge as well in the present case. If a trial judge sitting as the sole trier of fact is entitled to deference in his factual determinations, *a fortiori* the unanimous decision of a seven person jury approved by the trial judge's denial of a motion for judgment n.o.v. is entitled, at the very least, to the same deference. Both the trial judge and the jury have the advantage of hearing all the evidence and observing the character and demeanor of the witnesses. They are, as the decisions of a myriad of courts have held for centuries, in a far better position to determine the credibility of the testimony given and the weight to be given to the evidence than is an appellate court, reviewing a lifeless printed record.

Deference to the determinations of triers of fact is not limited to bench trials. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), this Court considered the standard to resolve conflicting inferences from the evidence before a jury:

> Undoubtedly, all of the evidence . . . does not point in one direction and different inferences might reasonably be drawn from it. There was, however, sufficient evidence to go to the jury and it is the jury which "weighs the contradictory evidence and inferences" and draws "the ultimate conclusion as to the facts." *Tennant v. Peoria & P.U.R. Co.*, 321 U.S. 29, 35. Id. at 700-701.

It rejected the appellate court's substitution of its own judgment for that of the jury:

> The evidence relied upon by the court can just as reasonably be read in a manner favorable to Continental and it appears that the court may have misapprehended significant parts of the record. *In any event, the interpretation and significance of this evidence were for the jury.* (Id. at 701, emphasis supplied).

The credible evidence in the present case fully supports the facts and inferences found by the jury in DiRose's favor, and the Second Circuit misapprehended or totally ignored significant parts of the record.

It appears from its decision in this case and in numerous others that the Second Circuit has simply decided to disregard this Court's directions in *Continental Ore, Inwood* and *Pullman*. This Court exercised its supervisory powers to correct the erroneous standard applied by the Second Circuit in *Inwood*. It should do no less here.

B. ***The Second Circuit's Review of all Evidence to Determine Whether Substantial Evidence Supports a Jury Verdict Conflicts With Decisions of the First and Third Circuits.***

The Courts of Appeals, guided by the decisions of this Court,[7] are in general agreement that they may reverse a jury verdict, or a denial of a motion for judgment n.o.v., only if fair-minded men could reach but one conclusion from the credible evidence. A conflict exists, however, as to the evidence an appellate court may review in applying that broad standard.

The First Circuit has held that, in reviewing a directed verdict for the defendant at the close of the evidence,[8] it should consider only the non-movant's evidence and uncontradicted and unimpeached evidence introduced by the movant. *Dehydrating Process Co. v. A.O. Smith Corp.*, 292 F.2d 653 (1st Cir. 1961). That court has expanded its "field of vision" to include documentary evidence, the existence of which is undisputed. *Layne v. Vinzant*, 657 F.2d 468 (1st Cir. 1981). The Court of Appeals for the Third Circuit has adopted the same standard. *Inventive Music Ltd. v. Cohen*, 617 F.2d 29, 33, (3d Cir. 1980); *Fireman's Fund Insurance Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1178 (3d Cir. 1976) (holding that inferences from contradicted testimony must be left to the jury).

The Fifth Circuit has broadened its review to consider all the evidence, not merely that supporting the non-movant. *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969). The Court of Appeals for the District of Columbia applies the same doctrine. *Boutros v. Riggs National Bank, D.C.*, 655 F.2d 1257 (D.C. Cir. 1981). See also *Panter v. Marshall Field & Co.*, 646 F.2d 271 (7th Cir. 1981).

The conflict among the Circuit Courts is real, not a question of semantics. 9 C. Wright & A. Miller, Federal Practice and Procedure §2529 (1971). That commentator argues that a rule permitting consideration of all the evidence is too broad, urging instead that only the movant's uncontradicted evidence be

[7] *Lavender v. Kurn*, 327 U.S. 645 (1946); *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29 (1944); *Brady v. Southern Railway Co.*, 320 U.S. 476 (1943); and *Gunning v. Cooley*, 281 U.S. 90 (1930).

[8] The same standard of review applies to directed verdicts and motions for judgment n.o.v. *Yazzie v. Sullivent*, 561 F.2d 183, 188 (10th Cir. 1977).

included with the non-movant's evidence in the appellate court review. Id.[9]

The Second Circuit has now joined those circuits involving itself in review of all the evidence and in determinations of credibility, although that was not always the case. In *Bigelow v. Agway, Inc.*, 506 F.2d 551 (2d Cir. 1974), the court reviewed only the non-movant's evidence and the movant's uncontradicted and unimpeached evidence in reversing a directed verdict for the defendants. In *County Asphalt, Inc. v. Lewis Welding & Engineering Corp.*, 444 F.2d 372 (2d Cir. 1971), the court held that the jury need not accept testimony merely because it was uncontradicted and unimpeached. The *jury* was to determine credibility, and was not bound to accept the testimony of the plaintiff's damages expert. "[W]hen it comes to finding facts from the evidence, juries enjoy a near-total independence." Id. at 378.[10]

Apparently, that is no longer true. In *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737 (2d Cir. 1975), the court examined the entire record, rejected certain evidence favoring the plaintiff, and concluded that there was insufficient evidence to support the jury verdict. This practice has now become the rule in the Second Circuit, and that Court routinely substitutes its judgment on factual issues and credibility of testimony for that of the trier of fact.

Definition of the proper role of the appellate court in reviewing jury verdicts and determinations of credibility and ultimate fact is critical to the assurance of the right to trial by jury envisioned by and articulated by the Seventh Amendment. The deference which this Court accords to the determinations

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[9]Other commentators have also criticized the "no holds barred" approach to review of factual determinations. Cooper, Directions for Directed Verdicts: A Compass for Federal Courts, 55 Minn. L. Rev. 903, 948-53 (1971); Bagalay, Directed Verdicts and the Right to Trial by Jury in Federal Courts, 42 Tex. L. Rev. 1053, 1062-63 (1964); James, Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict, 47 Va. L. Rev. 218, 226 (1961).

[10]See also dicta in *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970).

of the trier of fact is clear. The conflict concerning the appropriate scope of review of verdicts threatens the traditional respect for those factual determinations. Certiorari is required to resolve the conflict and to re-emphasize to all of the Circuit Courts the scope of appellate review which this Court has determined to be consistent with the Seventh Amendment.[11]

CONCLUSION

Based upon the foregoing, it is respectfully requested that this petition for Writ of Certiorari be granted to review the judgment and opinion of the Second Circuit since that decision is in clear conflict with the decisions of this Court and Courts of Appeals in other circuits and since the issue here presented raises significant and recurring questions of federal law.

Dated: March 18, 1983
Buffalo, New York

Respectfully submitted,

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[11]The Seventh Amendment to the United States Constitution prohibits the Courts of Appeals and this Court from redetermining facts found by the jury. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 359 (1962). In the past, the Second Circuit at least has paid lipservice to the strictures thereby imposed on it. See *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036 (2d Cir. 1976). DiRose presented his evidence and arguments to the jury. The jury heard the testimony and observed the demeanor of all the witnesses. Nevertheless, the Second Circuit conducted its own review of the evidence inferring that there was no fraud nor proof of damages. In so doing, it effectively denied DiRose his right to trial by jury.

APPENDIX A

DECISION AND ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT n.o.v. AND FOR A NEW TRIAL (Pages 53A-60A).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

J. RICHARD DiROSE,

Plaintiff,

-vs-

PK MANAGEMENT CORP., NICHOLAS A. DeMARE, FRANK CICCARELLI, JOHN S. RUSSO, HARRY KURSH, ANTHONY CURATOLO and JEROME DANSKER,

Defendants.

CIV-78-334

MEMORANDUM and ORDER

This action arises out of plaintiff's lease of certain pizza stores or restaurants to PK Management Corp. ("PK"). Plaintiff claims that PK and Frank Ciccarelli, a Director and Executive Vice President of PK, committed fraud in connection with said lease. Plaintiff also asserts a cause of action against PK for goods had and received. A jury trial was commenced June 8, 1981 and resulted in a verdict July 1st in favor of plaintiff in the amount of $362,000 on his fraud claim and $30,283.33 on his claim for goods had and received. In addition, the jury awarded $500,000 in punitive damages against PK and Ciccarelli. PK and Ciccarelli have moved for judgment notwithstanding the verdict or, in the alternative, for a new trial.[1]

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[1]The Complaint asserts four causes of action against PK and various individual defendants. The individual defendants are DeMare (Director, President and Treasurer of PK), Ciccarelli and Curatolo (a broker and

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Defendants' motion for a judgment n.o.v. may succeed if "the evidence is such that without weighing the credibility of the witness there can be but one reasonable conclusion as to the verdict * * *." *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 479 (1943). This standard has been taken to mean that:

> "If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury." *Gehrhardt* v. *General Motors Corp.*, 581 F.2d 7, 14 (2d Cir. 1978), *quoting* Boeing Company *v.* Shipman, 411 F.2d 365, 374 (5th Cir. 1969).

In ruling on defendants' motion, I must examine the entire record in the light most favorable to plaintiff. *Cora Pub, Inc.* v. *Continental Cas. Co.*, 619 F.2d 482, 484 (5th Cir. 1980).

Ciccarelli and PK have raised a number of arguments in support of their motion for judgment notwithstanding the verdict. First, they contend that there is no evidence that any fraud was committed in connection with the lease agreement. Plaintiff claims, and the jury could reasonably have concluded, that Ciccarelli, acting on behalf of PK, represented to plaintiff

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—Footnote continued from preceding page

dealer in securities). The first cause of action claims damages of $300,000 against PK, Ciccarelli and DeMare for fraud in inducing the lease agreement. The second cause of action asserts a claim against PK for goods had and received. The third and fourth causes of action allege violations by all defendants of section 10b of the Securities Exchange Act of 1934 and section 352-C of New York's General Business law. At the conclusion of plaintiff's case-in-chief, I granted DeMare's motion to dismiss the Complaint as to him. I also granted a motion by all of the defendants to dismiss the third and fourth causes of action. However, I denied PK's motion to dismiss the second cause of action and motions by PK and Ciccarelli to dismiss the first cause of action.

that PK would redecorate the leased restaurants but that PK had no intention of doing so. Defendants contend that plaintiff was not defrauded by such representations because Ciccarelli told plaintiff that PK's Board of Directors would not commit itself in writing to redecorate the restaurants. Defendants also contend that plaintiff was told that PK would redecorate only if the sales warranted. The jury could reasonably have concluded that Ciccarelli told plaintiff that a written agreement to redecorate was not necessary and that PK would redecorate the restaurants even though it would not formally commit itself in writing. Moreover, the jury could reasonably have found that PK did not intend to redecorate the leased restaurants, without regard to whether sales were adequate. Therefore, defendants' argument that plaintiff failed to demonstrate fraud is meritless.

Defendants have also suggested that plaintiff has failed to prove any damages caused by their fraud. The testimony of plaintiff's expert witness, Leonard Dopkins, indicates that the value of the restaurants which plaintiff leased to PK was $362,000. To my mind, Dopkins's testimony was weak and his method of computing the value of the restaurants was suspect. However, defendants failed to significantly undermine Dopkins's testimony on cross-examination. More importantly, defendants also failed to counter Dopkins's testimony by producing their own expert witness. Thus, although the jury was not bound to accept Dopkins's opinion concerning the value of plaintiff's restaurants, the jury's reliance on such opinion was not unreasonable.

A more difficult question, which defendants have not fully pursued, concerns proof of the value of the restaurants in December, 1976, at which time plaintiff, through the Buffalo George Urban Corporation, re-acquired the restaurants. Generally, the measure of damages for a claim based on fraud is the difference between the value of the property given up by the plaintiff and the value of the property received in return. *Holm* v. *Shilensky*, 388 F.2d 54, 58 (2d Cir. 1968); *Morris* v.

Lewis, 427 N.Y.S.2d 858, 859 (2d Dep't 1980). Thus, in the present case, I instructed the jury that plaintiff's damages were to be measured by the value of the restaurants which he leased to PK in March 1976 less the value of rights or property received in return. I pointed out that the value of rights or property which plaintiff received in return for the lease of the restaurants was uncertain, and cautioned the jury not to speculate or guess as to the extent of plaintiff's damages.

The jury awarded damages of $362,000 on plaintiff's claim for fraud and therefore appears to have disregarded the value of any rights or property returned to plaintiff. It was not unreasonable for the jury to do so. The return of the restaurants to plaintiff in December 1976, an event which occurred only at defendants' option, is a factor which mitigates plaintiff's damages. As such, the burden of proving the value of the restaurants at the time they were returned to plaintiff was placed upon defendants. *See, Cornell* v. *T.V. Development Corp.*, 17 N.Y.2d 69, 74, 268 N.Y.S.2d 29, 33 (1966); *Beyer* v. *Murray*, 306 N.Y.S.2d 619, 623 (4th Dep't 1970); *Caiazzo* v. *Volkswagenwerk, A.G.*, 468 F.Supp. 593, 599 (E.D.N.Y. 1979). *See, also, Contemporary Mission, Inc.* v. *Famous Music Corp.*, 557 F.2d 918, 926 (2d Cir. 1977). Certainly, defendants were in a better position to prove the value of the restaurants in December 1976 than was plaintiff. There was substantial evidence that the decline in the value of the restaurants was caused by defendants' business practices. Because the defendants failed to offer any evidence concerning the value of the restaurants at the time they were returned to plaintiff, the jury's disregard of such value in assessing plaintiff's damages was proper. Uncertainty as to the amount of damages does not bar recovery of damages measured by some practical means. *Mills Studio, Inc.* v. *Chenango Valley Corp.*, 221 N.Y.S.2d 684, 687-8 (3d Dep't 1961).

Defendants have also relied on a release executed by plaintiff in connection with his purchase of the stock of Buffalo George

Urban Corporation. Plaintiff claims that the release was procured by defendants through economic duress. In order to successfully rely on the release, defendants were required to prove that the release was voluntarily executed by plaintiff. *Fleming* v. *Ponziani*, 24 N.Y.2d 105, 110, 229 N.Y.S.2d 134, 139 (1969). The jury's apparent conclusion that defendants failed to prove a lack of duress was reasonable in light of all the evidence in the case.

Defendants' next contention is that punitive damages are not available in the current case. Under New York law, punitive damages may be awarded in an action based on fraud if the defendant's actions are morally culpable. *Rosenberg* v. *GWV Travel, Inc.*, 480 F.Supp. 95, 97 (S.D.N.Y. 1979); *Chase Manhattan Bank, N.A.* v. *Perla*, 411 N.Y.S.2d 66, 69 (4th Dep't 1978). It is not necessary that the fraud be directed at the public generally. *Borkowski* v. *Borkowski*, 39 N.Y.2d 982, 387 N.Y.S.2d 233 (1976); *Greenspan* v. *Commercial Ins. Co., Etc.*, 395 N.Y.S.2d 519, 520-1 (3rd Dep't 1977). I instructed the jury that punitive damages could be awarded if defendants had in fact committee fraud and their conduct had been malicious, wanton, or oppressive. The jury's award of punitive damages is supported by substantial evidence and cannot be said to be unreasonable.

PK claims that it is entitled to judgment notwithstanding the verdict with respect to plaintiff's second cause of action because plaintiff failed to prove that PK had agreed to pay for inventories and supplies contained in the restaurants at the time they were leased. A quasi-contractual obligation, such as an obligation to pay for goods had and received, is not based on an agreement between the parties, but is an obligation imposed by law. *Gulf Oil Trading Co.* v. *Creole Supply*, 596 F.2d 515, 520 (2d Cir. 1979); *Bradkin* v. *Leverton*, 26 N.Y.2d 192, 196, 309 N.Y.S.2d 192, 195 (1970). Thus, plaintiff's failure to prove the existence of an express agreement to pay for the inventory and supplies is not fatal to his second cause of action. The value of

inventories and supplies on hand at the time plaintiff re-acquired the restaurants would mitigate plaintiff's recovery on his second cause of action. However, because PK did not offer proof as to such value, the jury reasonably awarded what it determined to be the reasonable value of goods delivered by plaintiff to PK.

In support of their motion for a new trial, defendants argue, *inter alia*, that the jury's verdict is contrary to the weight of the evidence. As I have previously indicated, however, the verdict is supported by substantial evidence and cannot be deemed unreasonable.

Defendants have also suggested that the amount of damages is excessive. A jury's award of damages may be set aside when it would be unconscionable to let the award stand or when it appears that the award is a result of passion or prejudice or shocks the judicial conscience. *Dagnello* v. *Long Island Rail Road Company*, 289 F.2d 797 (2d Cir. 1961); *Guerrero* v. *American President Lines, Ltd.*, 394 F.Supp. 333, 337 (S.D.N.Y. 1975). Although the amount of punitive damages awarded by the jury is substantial, the amount cannot be said to be unconscionable or shocking. Punitive damages are intended to punish and to deter other parties from engaging in the same or similar activity. In order to serve these purposes, the amount of damages must be relatively substantial, particularly against relatively affluent defendants. Finally, I see no reason to believe that the jury's award was the result of passion or prejudice.

Therefore, defendants' motions for judgment notwithstanding the verdict or, alternatively, for a new trial are hereby ORDERED denied.

Dated: Buffalo, N. Y.
September 4, 1981

JOHN T. ELFVIN,
U.S.D.J.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. No. 1170—August Term, 1981

(Argued May 21, 1982 Decided October 25, 1982)

Docket No. 81-7669

J. RICHARD DIROSE,

Plaintiff-Appellee,

—v.—

PK MANAGEMENT CORP., NICHOLAS A. DEMARE, FRANK CICCARELLI, JOHN S. RUSSO, HARRY KURSH, ANTHONY CURATOLO and JEROME DANSKER,

Defendants-Appellants.

Before:

TIMBERS, VAN GRAAFEILAND and KEARSE,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Western District of New York, Elfvin, J.,

following a jury verdict awarding plaintiff $392,282.33 compensatory damages and $500,000 punitive damages. Reversed and remanded with directions to grant a new trial.

PERCIVAL OVIATT, Rochester, N.Y. (Woods, Oviatt, Gilman, Sturman & Clarke, Rochester, N.Y., on the brief), *for Defendants-Appellants*

VICTOR FUZAK, Buffalo, N.Y. (Hodgson, Russ, Andrews, Woods & Goodyear, and Allen H. Beroza, Buffalo, N.Y., on the brief), *for Plaintiff-Appellee*

VAN GRAAFEILAND, *Circuit Judge*:

PK Management Corporation (PK) and Frank Ciccarelli appeal from a judgment of the United States District Court for the Western District of New York, Elfvin, J., entered upon a jury verdict in favor of appellee Richard DiRose in the amount of $892,282.33, and from Judge Elfvin's order denying appellants' motion for judgment n.o.v. or a new trial. For the reasons discussed below, we hold that appellants' motion for a new trial should have been granted and reverse with directions to grant a new trial.

In 1959, appellee opened a pizza and sandwich shop in Buffalo, New York. By 1975, appellee's pizza operation had expanded to a chain of eighteen stores, operating in

leased premises and employing 250 people. The rapid expansion of appellee's enterprise created serious cash flow problems, however, and in 1975 appellee had great difficulty meeting his monthly obligations for rent and operating costs, which totaled around $18,000. During that year, he had a net loss of $109,871. For the first three months of 1976, his loss was $47,403. He was also seriously in debt. As a result of his financial difficulties, appellee became interested in subleasing or selling all or part of his business.

In August, 1975, a real estate broker introduced DiRose to appellant Frank Ciccarelli, the executive vice-president of PK, a public corporation which owned and operated several "Pizza Kitchen" restaurants in the Rochester, New York area. Ciccarelli undertook a thorough study of the DiRose operation in order to determine whether PK and DiRose could work out a business deal. Over the next few months, the two men discussed several proposals for PK's acquisition of part of the DiRose chain. Although DiRose and Ciccarelli originally considered a purchase and sale transaction, the plan gradually evolved into one under which PK would sublease several of appellee's locations with the possibility of later taking over additional stores.

On February 4, 1976, appellee and Ciccarelli signed an agreement which, as amended on March 18, 1976, provided for the sublease of eleven of appellee's stores to PK. The contract provided that the subleases would run from March 1, 1976 to September 30, 1976, but PK reserved the option to terminate any sublease on one month's notice or to renew for additional six-month periods on the same terms as the original sublease. In addition, appellee appointed PK as his agent to renew the prime leases if PK decided to exercise its option to renew.

PK was obligated under the agreement to pay appellee the amounts which he owed for store and equipment rental and to pay for utilities and ordinary repairs.

As authorized by the terms of the sublease agreement, PK assigned its interest in the stores to its wholly-owned subsidiary, Buffalo George Urban Corporation, which took over the operation of the stores on March 15, 1976. Appellee was hired as manager of the operation at a salary of $25,000 per year.

In August or September, 1976, PK decided not to renew any of the subleases. Ciccarelli informed appellee of the decision and indicated that appellee's employment would be terminated when the leases reverted to appellee. Ciccarelli suggested that appellee purchase the Buffalo George stock so that he might issue shares and raise the capital necessary to continue operating the restaurants. Ciccarelli indicated that his son-in-law, Anthony Curatolo, would be willing to become appellee's partner in the purchase and assist in raising capital.

On October 9, 1976, appellee and Curatolo signed a written agreement to purchase all the stock in Buffalo George for $10,000. The sale was consummated on December 13, 1976. On that day, appellee executed a general release of PK and its officers for all liability arising out of the February agreement.

Things did not go well for appellee and Curatolo. In January, 1977, Curatolo withdrew from the business and, in July of that year, appellee disposed of the last of his stores. In June, 1978, appellee brought this action, claiming that he had been fraudulently induced to sign the February 4, 1976, agreement by Ciccarelli's oral promises that the subleased premises would be redecorated. In addition, appellee alleged that he was entitled to $30,000 for inventory that was in his stores when PK took them

over. Other claims by appellee were dismissed in the court below and are not a subject of this appeal.

After a trial before Judge Elfvin, the jury returned a verdict for appellee in the amount of $362,000 compensatory damages and $500,000 punitive damages on the fraud claim and $30,282.33 on the inventory claim. Appellants' motions for judgment n.o.v. or for a new trial were denied by the district court and the matter is now before us for review. For several reasons, which are hereinafter discussed, we conclude that the judgment must be vacated and the matter retried.

Discussion

Under New York law, a person who induces another to enter into a contract by making a promise which he has no intention of keeping may be held liable in damages for fraud. *Channel Master Corp. v. Aluminium Limited Sales, Inc.*, 4 N.Y.2d 403, 406-09 (1958); *Sabo v. Delman*, 3 N.Y.2d 155, 160 (1957). The essential elements of the injured party's cause of action are "representation of a material existing fact, falsity, *scienter*, deception and injury." *Channel Master Corp. v. Aluminium Limited Sales, Inc., supra*, 4 N.Y.2d at 407. Because it is clear beyond peradventure that the jury's verdict on damages was predicated on facts that were not in evidence and upon a misguided understanding of the applicable law, we will discuss that issue first.

Damages

The district judge instructed the jury that appellee's damages on his fraud count should be measured by the value of the rights he gave up less the value of the rights

he received in return. Thereafter, the judge narrowed this charge, telling the jury that what appellee lost was "the difference between the value of his eleven units as of March 18, 1976, and the value of the eleven or so which Buffalo George Urban had December 13, 1976." The charge as first given was correct. *Holm v. Shilensky,* 388 F.2d 54, 58 (2d Cir. 1968). As amended, the charge was faulty in that it did not take into account all the rights or benefits received by appellee, such as the assumption by appellants of appellee's $18,000 monthly indebtedness and his salary as manager.

Moreover, appellee had produced no evidence as to the value of the stores on December 13, 1976. The testimony of appellee's expert witness, Leonard Dopkins, was that, in February, 1976, appellee's entire business was worth $362,100. Dopkins was not asked to evaluate the eleven subleased stores as of the time they were returned to appellee in December, 1976, and he did not do so. The jury's verdict on this claim was in the exact amount of the February appraisal, $362,100.

In denying appellants' motion for a new trial, the district judge attempted to explain away the prejudicial error which is obvious in this verdict, by stating that the burden of proving the value of the restaurants at the time they were returned was on the appellants. This was contrary to what the judge had charged the jury and is contrary to the law. *Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd.*, 265 F.2d 418, 422 (2d Cir. 1959).

Assuming for the argument only that appellee's damages could have been measured solely by the value of his entire business in February, 1976, Dopkins failed to make a proper estimate of that value. Dopkins arrived at the figure of $362,000 by comparing appellee's individual

entrepreneurship with the appellant PK, an over-the-counter, publicly held corporation. Dopkins assigned a value to PK, subtracted ten percent from that value because appellee's company was not publicly owned, and then discounted the remaining ninety percent another two-thirds so as to be "reflective of Mr. DiRose's different conditions". Obviously, if Dopkins did not start with a correct evaluation of PK, his entire appraisal was flawed.

In evaluating PK, Dopkins simply picked a price at which PK's shares had sold in over-the-counter transactions and multiplied this figure by the number of that company's outstanding shares. This simplistic method of appraisal did not meet the requirements of New York law. Appraisals under Section 623 of the New York Business Corporation Law (McKinney 1963) must be based on three factors: net asset value, investment (or earnings) value, and market value. *Matter of Endicott Johnson Corp. v. Bade*, 37 N.Y.2d 585, 587-90 (1975). All three factors have to be considered. *Id.* Appraisals based solely upon over-the-counter stock prices are not sufficient. *Matter of Silverman*, 282 A.D. 252, 258-63 (1953); *Matter of Kaufmann, Alsberg & Co. v. H.L. Green Co.*, 30 Misc. 2d 1025, 1030-31, *aff'd*, 15 A.D.2d 468 (1961). The district court should not have accepted such an appraisal in this case.

We conclude also that Dopkins inadequately explained and supported the substantial adjustments in value which he made as between appellee's company and PK. A publicly held corporation worth three or four times a privately held company is not an ideal comparable of the latter. *See Latham Holding Co. v. State*, 16 N.Y.2d 41, 45 (1965). Because substantial adjustments have to be made, the expert witness must explain the factors upon which he

based his judgment. *Matter of Taylor v. State*, 39 A.D.2d 984, 985 (1972). Adjustments which rest upon conclusory and subjective opinions will not suffice. *Morio v. State*, 34 A.D.2d 845, 846 (1970). They cannot be, as Dopkins conceded they were in the instant case, "something that [he] dreamed up."

Appellee's proof of damages on the fraud count was also deficient in that Dopkins based his appraisal on appellee's entire business, not simply the eleven stores that PK subleased.

For all of the foregoing reasons, the damage award must be vacated. *Astles v. Quaker City Bus Co.*, 158 F.2d 979, 980 (2d Cir. 1947); *Slater v. KFC Corp.*, 621 F.2d 932, 937-38 (8th Cir. 1980). It does not follow, however, that appellee's complaint must be dismissed. In the exercise of our discretion, we think it better that the matter be remanded for a new trial so that appellee may have an opportunity to furnish the proof that is lacking. *See Slaughter v. Philadelphia National Bank*, 417 F.2d 21, 33 (3d Cir. 1969). Because we are troubled in several respects by the jury's verdict on liability, we will not limit the retrial to the issue of damages but will order that the entire case be retried. *Id. See also Caskey v. Village of Wayland*, 375 F.2d 1004, 1009-10 (2d Cir. 1967).

The Fraudulent Conduct

In determining whether appellants were guilty of fraud, a fundamental question was Ciccarelli's state of mind at the time he allegedly promised to remodel appellee's store. Ciccarelli's state of mind was a fact, concerning which he might make a fraudulent representation. *Deyo v. Hudson*, 225 N.Y. 602, 612 (1919). Appellee's proof that Ciccarelli had no intention of remodeling at the time

he allegedly promised to do so was far from overwhelming. PK's corporate minutes show that its directors did discuss the remodeling of three of the stores, and plans that were prepared for the remodeling were introduced into evidence. Mr. DeMare, PK's president, testified that the remodeling did not take place because the sales volume in the stores was not sufficient to justify it. One explanation of why the jury reached the verdict it did may be found in the court's charge.

A well-accepted principle of law is that "[f]raud includes the pretense of knowledge when knowledge there is none." *Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. 170, 179 (1931). This principle finds expression in the charge often given that a defendant may be guilty of fraudulent misrepresentation for making a false statement without knowing it to be false, if he made it recklessly with the pretense of knowledge that it was true when in fact he knew that he had no such knowledge. *See* New York Pattern Jury Instructions 682 (1968). To be guilty of fraud in this manner, the speaker must know that he has no knowledge on the subject concerning which he speaks. 37 C.J.S. Fraud § 21(b), at 258 (1943).

The district court instructed the jury that "[a] promise is false if at the time it was made, the person making the promise has [sic] no intention of performing or carrying it out." Mr. Ciccarelli's intent or state of mind when he made the alleged promise obviously was a matter concerning which he had knowledge. Nevertheless, the district court went on to instruct the jury that if Ciccarelli "made the representations recklessly without knowledge of whether they were true", the jury's finding would be that there was an intent to deceive. This charge could only have confused the jury and, in the setting of this case, was improper.

The court also charged that events occurring after the promise was made might provide evidence to the jury of the intent with which the promise was made. In the light of the "recklessness" charge just discussed, this statement, made without embellishment or reservation, was prejudiciously erroneous. Under New York law, "any inference drawn from the fact that the expectation did not occur is not sufficient to sustain the plaintiff's burden of showing that the defendant falsely stated his intentions." *Lanzi v. Brooks*, 54 A.D.2d 1057, 1058 (1976), *aff'd*, 43 N.Y.2d 778 (1977), *quoted in Harris v. Camilleri*, 77 A.D.2d 861, 863 (1980). As former Judge Smith of this Court stated in his customary succinct fashion, "actionable fraud depends on more than a showing of non-performance." *Perma Research and Development Co. v. Singer Co.*, 410 F.2d 572, 576 (2d Cir. 1969). The jury should have been so instructed. The jury's license to consider both recklessness and nonperformance as indicative of Ciccarelli's state of mind could only have resulted in prejudice to the appellants.

The Release

On the fourth day of the trial, the district court permitted appellee, over appellants' objection, to amend his complaint to add several additional charges of fraud, includ ing an allegation that he was promised a job as manager of the subleased stores at an annual salary of $25,000. The sublease, it will be recalled, was for a six-month, renewable term, which, in fact, was not renewed.

Buffalo George Urban Corporation, PK's wholly-owned subsidiary and its assignee under the sublease agreement, hired appellee at the agreed salary. However,

when the sublease terminated and appellee and Anthony Curatolo became the owners of Buffalo George, appellants' obligation under the alleged oral hiring agreement also terminated. Giving the alleged hiring agreement the broadest possible interpretation, the parties could not have intended that appellee's employment as manager of the subleased stores would extend beyond the expiration of the sublease. More over, New York law is clear, that, unless a definite period of time is specified in an employment contract, the hiring is at will. *Watson v. Gugino,* 204 N.Y. 535, 541 (1912); *Walford v. British Caledonian Airways,* 52 A.D.2d 922 (1976).

Despite the foregoing, appellee argued successfully in the court below that concern over the loss of his job and the salvaging of his business induced him to sign the release of the claims asserted herein and constituted duress which avoided the release. We conclude, however, that the jury's finding of duress was against the great weight of the evidence, and resulted, in part at least, from inadequacies in the district court's charge.

Appellants requested the district judge to instruct the jury in accordance with the New York law on the terminability of employment agreements, but the judge refused to do so. Moreover, the judge failed to make it clear to the jury that, under New York law, threats to enforce a party's legal rights do not constitute duress. *Stewart M. Muller Construction Co. v. New York Telephone Co.,* 40 N.Y.2d 955, 956 (1976); *Avey v. Town of Brant,* 263 N.Y. 320, 322 (1934). The jurors could not intelligently consider appellee's claim of duress without knowing what appellants' rights were. The district court's failure to tell them was extremely prejudicial to appellants.

There is another facet to appellee's claim of duress which to this date has not been discussed or considered.

Appellee, who was represented by an attorney, signed the contract to purchase Buffalo George on October 9, 1976, and agreed therein to deliver a general release to appellants on the closing date, which was delayed until appellee could secure a liquor license. On December 13, 1976, after the liquor license had been secured, appellee executed the release in the presence of his attorney. He resumed possession and control of the subleased restaurants and made no complaint of duress until after he had commenced this action on June 22, 1978.

A contract or release, the execution of which is induced by duress, is voidable, not void, and the person claiming duress must act promptly to repudiate the contract or release or he will be deemed to have waived his right to do so. *Joseph F. Egan, Inc. v. City of New York*, 17 N.Y.2d 90, 98 (1966); *Leader v. Dinkler Management Corp.*, 26 A.D.2d 683 (1966), *aff'd*, 20 N.Y.2d 393 (1967); *Powell v. Oman Construction Co.*, 25 A.D.2d 566 (1966); *Feyh v. Brandtjen & Kluge, Inc.*, 1 A.D.2d 1014 (1956), *aff'd*, 3 N.Y.2d 971 (1957); *Port Chester Electrical Construction Corp. v. Hastings Terraces, Inc.*, 284 A.D. 966, 967 (1954). Under the authority of the above cases, it would appear that appellee waived his right to claim duress. However, since this contention was not urged in the trial court, we will not pass upon it here, but will permit the district court to do so upon remand. Unless appellee comes forward with a compelling reason for his lengthy delay in repudiating the release, the district court is directed to dismiss appellee's claims on the law.

The Inventory

The jury's award of $30,282.33 on appellee's claim of damages for unreturned inventory must also be vacated.

Putting aside the question whether appellee's general release covered this claim, there was a total absence of proof as to what part of the inventory was kept and what part was returned and the value of each part. The district court stated in its charge that there was "a great uncertainty dearth evidence [sic] in that regard", and that there were "inadequacies of proof as to the value at the start and the value at the end." We agree.

The Punitive Damage Award

Since we are directing that there be a trial de novo, we vacate the award of punitive damages. In so doing, we have given no consideration to the propriety per se of the award.

Disposition

The judgment in favor of appellee and against appellant PK Management Corporation and Frank Ciccarelli is reversed in its entirety and the matter is remanded to the district court with instructions to grant a new trial.

DiRose and Ciccarelli both reside in Florida and PK is a Rochester corporation now proceeding in bankruptcy before the Bankruptcy Court in Rochester. Under all the circumstances we think it better that the case be transferred to Rochester for retrial before another district judge. It is so ordered.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

81	7669
Docket Number	

J. RICHARD DiROSE — Plaintiff-Appellee

-vs-

FX MANAGEMENT CORP. and FRANK CICCARELLI — Defendants-Appellants

NOTICE OF MOTION

for ENLARGEMENT OF TIME FOR FILING PETITION FOR REHEARING - F.R.A.P. 40(a)

MOTION BY: (Name and ad. no. of attorney in charge)
Victor T. Fusak (716/856-4000)

OPPOSING COUNSEL: (Name and ad. no. of attorney in charge)
PERCIVAL D. GWIAZT (716/454-5370)

Has opposing counsel consented? ☐ Yes ☒ No
Has service been effected? ☒ Yes ☐ No
Is oral argument desired? ☐ Yes ☒ No
(Submission assumed only)
Requested return date: Tuesday, November 9, 1982
(See Second Circuit Rule 27(3))

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL
Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8)
Would appellant agree to expedited appeal schedule? ☐ Yes ☐ No
If so, explain why not:

Date of argument of appeal, if scheduled: Appeal was argued May 21, 1982
Judge or agency whose order is being appealed: Judgment July 6, 1981 (Hon. John T. Elfvin, Presiding)

Brief statement of the relief requested: Enlargement of the time allowed for filing of a petition for rehearing on behalf of J. Richard DiRose to and including Monday, November 21, 1982.

Previous requests for similar relief and dispositions: None.

Statement of the issue(s) presented by this motion: Will the Court exercise its discretion to allow the appellee the time needed to prepare a petition for rehearing?

Is there any prejudice to the appellants?

Brief statement of the facts (with page references to the moving papers): The Court announced its decision reversing the judgment below and remanding the case on October 25, 1982. Counsel for Mr. DiRose did not receive a copy of the Court's written opinion until November 1, 1982. The petition for rehearing on behalf of Mr. DiRose will address, among other things, points of fact in the 2,387-page record which the Court overlooked or misapprehended, as well as issues of law.

Summary of the argument (with page references to the moving papers): In the absence of relief from this Court, the appellee's petition for rehearing must be received by the Court by November 8, 1982, allowing counsel only one week from the date the Court's opinion was received. It is requested that the time for filing of the petition for rehearing on behalf of Mr. DiRose be extended to November 21, 1982. This requested relief can have no prejudicial effect upon the defendants-appellants.

November 3, 1982 — Victor T. Fusak
Date — Victor T. Fusak

ORDER

IT IS HEREBY ORDERED that the motion is granted.

NOV 15 1982

11-15

EXHIBIT C

Best Copy Available

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of December , one thousand nine hundred and eighty-two.

----------X

J. RICHARD DIROSE,

Plaintiff-Appellee,

v.

PK MANAGEMENT CORP., NICHOLAS A. DeMARE, FRANK CICCARELLI, JOHN S. RUSSO, HARRY KURSH, ANTHONY CURATOLO and JEROME DANSKER,

No. 81-7669

Defendants-Appellants.

----------X

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellee, J. Richard DiRose,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by Francis X. Gindhart
Francis X. Gindhart,
Chief Deputy Clerk

EXHIBIT D

APPENDIX E

Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict

(a) **Motion for Directed Verdict: When Made; Effect.** A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) **Motion for Judgment Notwithstanding the Verdict.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) **Same: Conditional Rulings on Grant of Motion.**

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) **Same: Denial of Motion.** If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

AMENDMENT VII—CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

APPENDIX F

have any --

THE COURT: I think the proper exploration is to ask the general question about the representation of Mr. Ciccarelli by Mr. Const, and you can get him to say, you know, to express to volunteer the full scope of that. And if that does not cover this particular proceeding, then you may show him Plaintiff's Exhibit 19B without saying what the document is and ask him who the attorney was who represented him in connection with that matter. And you can bring out the date of it.

MR. FUZAK: Without the indication --

THE COURT: Without the indication of what it was.

MR. FUZAK: Or with respect to what body it was before?

THE COURT: Right. Or that it was anything before anybody. It might be a contract.

MR. FUZAK: Well, I respectfully accept, if your Honor please, to the ruling.

THE COURT: Mr. Oviatt, where are you going?

MR. OVIATT: Pardon me just a minute. I will

be right back.

THE COURT: Bring Mr. Ciccarelli in, will you.

MR. FUZAK: Your Honor, I don't know what's going on outside, but I thought the Witness was excused from the court room so he would not be aprised of what the discussion was.

THE COURT: Mr. Oviatt. Mr. Oviatt. Mr. Ciccarelli come up here please. Right here. What just went on?

MR. OVIATT: I told him what the procedure was that --

THE COURT: Why did you tell him?

MR. OVIATT: Because he has a right to know, your Honor.

THE COURT: Why did you think he was put out of the court room?

MR. OVIATT: I don't know, but I --

THE COURT: You did not object to that.

MR. OVIATT: No. I had no reason to object to it.

THE COURT: So why did you then go out and tell him what had happened?

MR. OVIATT: Because he had a right to know

what your Honor's ruling was.

THE COURT: Why didn't you object then when I told him to go out of the court room.

MR. OVIATT: The two have no connection, your Honor.

THE COURT: They have very much of a connection.

MR. OVIATT: In my opinion they have not.

THE COURT: In my opinion they do and I think that's a gross transgression of your duties as an officer of this Court, Mr. Oviatt.

MR. OVIATT: I don't think there was any --

THE COURT: I think so.

MR. OVIATT: He is a defendant and he is entitled to know what transpired in this court.

THE COURT: He might have been entitled to stay in the court room, but once he went out, and you knew the rules of the game, you violated the rules that had been imposed by going out flatly to acquaint him in the hall with what had happened.

MR. OVIATT: He is a defendant here and he

has a right to know what proceedings have been taken.

THE COURT: He might -- he might have had a right to stay in the court room, but that was not asserted.

MR. OVIATT: He has a right to know the proceedings that have been taken.

THE COURT: No. You stand condemned. Take the chair. I find that a very bad practice, Mr. Oviatt.

MR. OVIATT: Well, I respectfully accept to your --

THE COURT: I find that a very bad practice, Mr. Oviatt.

MR. OVIATT: I don't know of any time --

(Jury Present)

THE COURT: Just a moment. Let me ask the Jury to step into my hallway for a moment. I just want you to step out for one minute, ladies and gentlemen.

(Jury escorted from the court room at 1:49 P.M.)

THE COURT: Now, Mr. Ciccarelli, tell me what Mr. Oviatt told you.

THE WITNESS: Mr. Oviatt, sir, told me that you wouldn't be allowing any questions on the subject matter of the N.A.S.D. And he also told me that I would be asked some questions about Nicholas Const.

THE COURT: And what did he tell you in that regard?

THE WITNESS: That was it, sir.

THE COURT: That was the totality?

THE WITNESS: Yes, sir.

THE COURT: All right.

Bring them back.

(Jury Present)

THE COURT: That's one disadvantage of operating without a Marshall in the court room which I try to do to save manpower. If I had him here, this would not have happened I assure you.

All right. Let's go ahead.

Have you any further examination,